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No. 211.

Sup. Ct. Bk. of Shipman for Supp.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

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PHINEAS PAM-TO-PEE AND OTHERS,
APPELLANTS,
v.
THE UNITED STATES.
No. 211.

APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for the Appellants.

JOHN B. SHIPMAN,
Attorney for the Appellants.

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Supplemental Brief for the Appellants.

In this brief the appellants will endeavor to correct the inaccurate statements in the defendant's brief so far as they are deemed important.

Page 6, at the bottom, referring to the protest of the appellants' counsel to the Secretary of the Interior of July 27, 1895, and of his seeing Cadman, the brief says: "It appears from this protest that Mr. Shipman had had various interviews with Mr. Cadman, and was familiar with what was being done by the Department." The matter would be trivial were it not for the fact that the defendant lays great stress upon his assumed knowledge of what the Department was doing and his alleged fami-

liarity with all that took place, which is based wholly upon that protest. But the paper cannot be tortured into supporting such an assumption. It shows the counsel saw Cadman only once and, read with a little common sense, the letter means that he first saw the Commissioner of Indian Affairs to find out what Cadman (who it seems had been sent into the field some six weeks previous and was engaged in something among the Indians) was doing. Instead of giving him the information or letting him know what the Department was up to, the Commissioner sent him to Cadman, the practice of the office being not to give out such information. Not until he saw Cadman was he informed of what the Department was doing, although the Commissioner might have told him but for the practice mentioned, of which the Court can take judicial notice.

The protest not only does not in any sense bear out the use the defendant makes of it in the brief, but actually negatives the idea that the counsel had any inkling, or was permitted to have any, of what was being done by the Department. Appendix 11.

This protest, which it was hoped might have the effect to open the Indian Office to the claimants, insured the closing of its door against them and their attorney forever.

Page 9. The brief states "the whole fund was $104,626, and it is not disputed that it was all paid out." The whole fund was $156,658.50 (see the statutes cited in claimants' petition, Record 6), and of this $118,552.52 was distributed to the Indians upon the Cadman roll after adding two names recommended by Shelby. Rec. 9. That it does not appear "how many Indians were allowed to participate in that distribution." The number was 272. Rec. 11.

In many places the brief asserts that Shelby's instructions were to add to the Cadman roll any Indians he found entitled to be there, and that he "placed upon the roll all those who shewed that they or their ancestors were on any of the rolls." These statements are all wrong. Instead of being instructed to add any Indians to the roll made by Cadman he was expressly forbidden to do so (Appendix 15), and his report shows he placed none thereon.

Page 29. "The claimants' attorney has found 272 Indians who, he says" (and proves, and the Court so finds, Record 9, Finding IV) "should have participated in this distribution, and therefore proposes that this $78,000 ($78,329.25) be distributed to the 272 Indians whom he has found." (Their names and places of residence were given in the petition in the original suit wherein the judgment in question was rendered.) "What is to prevent him or someone else from finding 272 more next year and getting another $78,000 under this judgment?"

It was the duty of the defendant to take a census of the Indians on the rolls from 1843 to 1866, for which $1,000 was appropriated, the enumerator to account for all of them and, if dead, their heirs, the same as Cadman was instructed to do in regard to the roll of 1866. (Rec. 11.) This was never done, Shelby's instructions not requiring him to take a census at all. (Rec. 14 and 15.) Had the defendant performed this duty the census would have answered the question asked in the brief. But no census of those on the rolls prior to 1866 was ever taken or attempted to be taken by the defendant. It ought not to ask questions which its acts would have answered if it had done its duty.

That the 272 claimants whose names are in Schedule A annexed to claimants' request for findings were entitled to

share in the judgment and funds mentioned is placed beyond dispute by the findings of fact of the court below. (Finding IV, Rec. 9 and 10, Appendix 4 and 5.)

The opinion states that the money distributed was paid to 272 Indians, being those upon the census taken by Cadman of those on the roll of 1866, two omitted ones being added by advice of Shelby. From page 13 to 20, inclusive, of the brief, the defendant insists and labors hard to establish that that census contained all who were entitled to the funds. From the proofs and facts found which the defendant has not deemed it wise to attempt to meet or controvert, it appears, however, there were 272 more Indians entitled to share in the fund, and they are the claimants in this cause. Thereupon the defendant reverses its position as to the correctness of the 1866 census, and urges there may be others over and above what that census and the findings of fact combined show. The defendant is not entitled to be heard upon such inconsistent positions.

But what is the fact? To arrive at the amount each Indian is entitled to in the fund, the whole number interested must be got at. But reasonable proof of this fact the circumstances considered is all that should be required. Before paying out a cent of the money it was the defendants' duty to have ascertained this as was recognized and ordered by Congress in appropriating $1,000 to pay for it. The brief says this could not have been done, but that is poor talk. It could as well have been done under any roll and in the same way as it was done under the roll of 1866 which the defendant claims is so complete as to be correct not only for that but for all prior rolls. Had Cadman's work included the other rolls as well as the roll of 1866, the imaginary difficulty would have vanished. And this is what the claimants' protest

of July 27, 1895, insisted should be done, but the Department ignored the request. The names of the 272 claimants and their residences were stated in the petition in the old case and also over 150 of them were named in that protest, but they were turned down. The claimants had no difficulty in proving their descent and relationship, nor would the Government have had any in finding all entitled to share in the fund, but its agents did not try to do so. Their aim was to not do so, and yet furnish an excuse for not doing it, to the end that "Critcher's Indians" (brief 19) might get all the money. As to there being others who may assert claims to the money, while it is an artificial presumption, yet it will not be assumed the number paid was wrong farther than the evidence shows. In other words, the number paid may be presumed to include all the Indians entitled except and to the extent that the roll is shown to have been erroneous. It is shown and found as a fact to be erroneous to the extent of 272 Indians who are the claimants herein. These and the number paid making 544 in all are the total number entitled to the fund, the amount belonging to each being $287.97. More complete proof of this fact short of what would have existed had the defendant performed its duty and taken a census of all on those rolls, is not attainable by any but the Government. The rolls are necessary to do it, and these the Government alone controls.

Are these facts sufficiently found to base the statement on that the whole number entitled to the fund was 544? The claimant's 8th request for findings of fact below was this: "The total number of Indians recovering said judgment and entitled to share in its payment was 544, of whom 272 are claimants in this case." Appendix . In closing its findings the court adds as a conclusion of law:

"And it is further ordered that the claimants' request for findings of fact be refused as irrelevant and immaterial, except so far as the same are found in the findings of the court," etc. Rec. 10. Finding IV specifically finds the number not paid to be 272. The fact that the number paid was 272, and that those paid and not paid bring the number of descendants entitled to the fund up to 544 persons, is stated in the opinion. Rec. 11. If this be not sufficient the court below might be required to be more specific. It is beyond dispute as to what the fact is.

Pages 29 to 42 of the brief are taken up with the question of distributing a fund among parties claiming differing interests in it, through the agency of chancery proceedings where all are given their "day in court," and a decree is made fixing the rights of the parties to the money, as on pages 15 and 16 of our original brief, we insisted the defendant should have done in this case. The defendant contends the way it adopted, however, was just as good as the way the law requires. On that we differ. The difference is this: Had it followed the way pointed out and provided by law, the claimants would have got their share of the fund, while in the way adopted someone else got it. Had the Department given notice of the distribution or given those claiming or who might claim a right to share in the funds to be distributed, an opportunity to assert their claims—and certainly they were advised and knew such existed—then something might be urged although not much, to excuse that method of doing the business. But even then no one would have been barred by it from asserting his rights in court, for the Department does not possess judicial powers, nor do its bureaus or officers; not even employees detailed on census duty among Indians.

Estoppel.—Neither on this or any other ground can

payment of a debt to any one but the creditor be justified where notice that it is wrong exists, and this the Department had notice of by the letter of July 27, 1895. Besides the record in the old case contained the names of these claimants and also their residence (Appendix 8).

The brief (page 46) says: "It would be too much to claim that the appellants stood by and said nothing for the purpose of inducing the United States to pay out this fund erroneously." Is it not also too much to claim they stood by and saw *their* money paid away and did not try to say something to stop it and to get it themselves? Presumptions spring from the way people usually act under given conditions. When their money interests are involved it cannot be presumed they kept silent or at least did not attempt to be heard in an effort to secure it.

But an estoppel admits a liability and is but an excuse for not paying or performing it. It is a defence and must be pleaded and the burden of proof to maintain it rests upon the one claiming it. It is not a favorite of courts of justice for it is against the merits of the case and hence must be strictly proven by the one invoking it as a shield against an honest claim. All elements constituting this defence must be established by proof and cannot be eked out by presumptions, especially unreasonable ones. The court below did not find the fact of estoppel, but negatived it by saying the defendant "was not without notice" of our rights. Rec. 14. Whenever such notice exists an estoppel is impossible.

The brief contains very many inaccurate statements of fact beginning with page 40 and continuing to the end of it. On this question, which will not be followed in detail, the top of page 46 containing a summary of the alleged facts upon which it rests the claim. Three of them will be noticed:

1. *Silence.*—This is not proven, and the letter of July 27, 1895, proves the contrary. And the record in the original case, containing the names and residences of these claimants, charges the defendant with notice and knowledge of their rights. This disposes of the 3d summary also.

4. "The United States distributed the fund, relying upon the fact that every claimant would come forward and establish his claim." Why, then, did it order a census of them to be taken? Why, then, did it appropriate $1,000 to pay for what the defendant relied upon each claimant to do without pay? Why did it send Cadman out to find those on the roll of 1866? Why was Shelby detailed? Were these persons sent out merely to see the procession of claimants coming in? The proposition will not bear investigation. And yet all those things must affirmatively appear, and moretoo to make out an estoppel. Any number of inaccurate statements of fact and deductions of fact have been passed over without mention, with the purpose of only troubling the Court with those which might have a bearing on questions affecting the result aimed at in the case.

If it is not well found that the total number of Indians entitled to the fund in question is 544, then the Court is respectfully asked to require the Court of Claims to find specifically upon the claimants' 8th request for findings of fact on that point. If the number stated in the opinion at 544 is correct, an outside claimant does not exist, not to mention the statute of limitations which would shut him out.

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